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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF THE ARIZONA ELECTRIC DIVISION OF CITIZENS COMMUNICATIONS COMPANY TO CHANGE THE CURRENT PURCHASED POWER AND FUEL ADJUSTMENT CLAUSE RATE, TO ESTABLISH A NEW PURCHASED POWER AND FUEL ADJUSTMENT CLAUSE BANK, AND TO REQUEST APPROVED GUIDELINES FOR THE RECOVERY OF COSTS INCURRED IN CONNECTION WITH ENERGY RISK MANAGEMENT INITIATIVES.

Docket No. E-01032C-00-0751

MEMORANDUM

Arizona Corporation Commission
DOCKETED

MAR 28 2002

DOCKETED BY

Pursuant to the Procedural Order of March 25, 2002, RUCO submits this memorandum of law regarding a possible conflict of interest with the representation of the Citizens Communications Company ("Citizens") by the law firm of Gallagher and Kennedy, P.A. ("Gallagher and Kennedy").

BACKGROUND

On September 28, 2000, the Arizona Electric Division of Citizens filed with the Arizona Corporation Commission ("Commission") an application to recover its purchased power costs paid to Arizona Public Service ("APS"). Citizens, among other things, is requesting that it be allowed to recover from ratepayers the wholesale purchased power costs paid to APS that

have been accumulating in its Purchased Power Fuel Adjustment Clause ("PPFAC") since April, 2000.

The hearing in this matter was scheduled to commence on March 25, 2002. On March 13, 2002, intervenor, Marshall Magruder filed a motion requesting the law firm of Gallagher and Kennedy to recuse itself from representing Citizens in this proceeding due to a possible conflict of interest. Mr. Magruder's motion suggests that, because one of the partners of Gallagher and Kennedy sits on the Board of Directors of APS' parent company, the firm has a conflict of interest in this matter that relates to possible overcharges by APS to Citizens. Mr. Magruder's motion was addressed at the pre-hearing conference held on March 21 and 22, 2002. At the pre-hearing conference, the Administrative Law Judge decided that further briefing by the parties on the issues raised by Mr. Magruder's motion was necessary and postponed the hearing until further notice.

Specifically, the issues to be addressed in briefs are:

1. Whether the Commission has the authority to take action, and if so, what action can the Commission take.

2. Whether there are some conflicts that cannot be waived, and if they can be waived is it in the public interest to waive the representation.

3. Whether the rules of professional responsibility is the end of the inquiry.

Public Interest and the Commission's Authority

Mr. Magruder's motion requests recusal based on the appearance of a conflict between Mr. Grant's representation of Citizens, and Mr. Gallagher's relationship to APS' Board of Directors. While Mr. Magruder presents no evidence to show there is an actual conflict, it is

clear that Mr. Magruder, a layman, perceives the appearance of a conflict. The Commission, as well as the Courts and the Bar, has the responsibility to maintain public confidence in its process and the legal profession. Gas-A-Tron of Arizona v. Union Oil Company of California, 534 F.2d 1322, 1324 (9th Cir. 1976)(quoting Richardson v. Hamilton International Corp., 469 F.2d 1382 (3rd Cir. 1972)). It is the responsibility of this Commission to maintain the highest standards of professional conduct in the management of cases before it, and to make sure that "...nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the integrity of the legal profession." In Re Asbestos Cases, 514 F.Supp. 914, 919-920 (E.D.Vir. 1981). This means that the Commission may disqualify an attorney for failing to avoid the appearance of impropriety. Gas-A-Tron of Arizona, 534 F.2d at 1324. This standard permits the Commission to disqualify an attorney, even though there has been no violation of the rules of professional responsibility.

The public will judge the appearance of an impropriety from a layman's prospective, without the appreciation of the lawyers or Judges who have certain obligations as "officers of the court." In Re Asbestos Cases, 514 F.Supp. at 924. Mr. Magruder, as a layman, has perhaps the most insightful viewpoint of how the public views the potential conflict.

The assurance of the public confidence in the process is so important, that a law firm cannot represent conflicting interests even with the consent of all concerned. Schear v. Elizabeth, 196 A.2d 774, 778 (1964). In some cases, not even an "effective Chinese Wall can allay public suspicion of the legal profession..." Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 300 (Tex.App. -Dallas 1988).

The Commission has authority to discipline attorneys who appear before it. See Stein, Mitchell, Mezines, Administrative Law § 42.01 (attached as Exhibit A). The Commission's

authority to discipline attorneys is derived from its general rulemaking powers. The Courts, starting with Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L. Ed. 494 (1926) have recognized that this power is a derivative of an agency's general grant to make necessary rules and regulations to implement its enabling statute[1]. Moreover, since the Commission's power is derived from its general rulemaking authority, it is not a prerequisite that the Commission have specific statutory authority to determine who can practice before it. Id. at 122, 46 S.Ct. 217; Koden v. Department of Justice, 564 F.2d 228, 233 (7th Cir.)(citing Goldsmith for the proposition that an agency that is empowered to make its own rules has the implied power to determine who can practice before it).

It is "elementary" that any administrative agency that has the power to determine which attorneys can practice before it has the authority to discipline those attorneys. Koden, 564 F.2d at 233. In fact, the Commission already has rules recognizing its power to prevent potential conflicts that may result from attorney representation. Arizona Administrative Code ("A.A.C.") R14-4-305 (B)[2] establishes standards for attorney representation of witnesses in Securities proceedings. FERC also has promulgated its own rules of practice and discipline for attorney's appearing before it. See 18 C.F.R. §§ 385.2101(a), 385.2101(b) (a copy of which is attached as Exhibit B).

The Commission may prevent an attorney from practicing before it in a temporary, short-term or permanent basis. See Stein, Mitchell, Mezines, Administrative Law § 42.03 (attached as Exhibit C). In addition, where there is a conflict of interest, the Commission may

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[1] Unlike most administrative agencies that derive their authority from statute, the Commission's authority over Citizens' application is based on state constitution. Therefore, for purposes of this discussion of the Commission's authority, references in other cases to enabling statutes or statutory authority should be construed as referring to the state constitution.

[2] Article 3 of the Commission's Security Rules has currently been suspended for revision. R14-4-305(B), although a rule under Article 3, is not one of the rules being considered for revision.

disqualify the attorney from participating in the proceeding. Id. Among its alternatives, the Commission may censure, suspend, disqualify, or disbar an attorney from practicing before it. Id. The appropriate alternative in administrative cases involving potential conflicts of interest involving attorney representation would be disqualification. Id. The Ninth Circuit Court of Appeals has recognized the authority of an Administrative Law Judge to make inquiry, and disqualify counsel if necessary where a potential conflict of interest may arise as the result of an attorney's representation. Smiley v. Director, Office of Workers Compensation Programs, 973 F.2d 1463 (9th Cir. 1992).

Conflict of Interest and the Waiver of Conflict

A lawyer in Arizona cannot represent a client where such representation would be directly adverse to another client. E.R. 1.7(a), Arizona Rules of Professional Conduct. The rule provides for an exception where the lawyer reasonably believes that the relationship will not adversely affect the relationship with the other client and each client consents after consultation. E.R. 1.7 (1)(a) and (b), Arizona Rules of Professional Conduct.

It is well settled that when dealing with ethical principles,

> "... we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent."

The Fund of Funds, Limited, FOF v. Arthur Anderson & Co, 567 F.2d 225, 227 (1977).

Historically, when considering conflict of interest issues in cases involving law firms, courts have started their analysis by looking at the subject matter and determining whether the interests of the clients in question are substantially related. Atasi Corporation, 847 F.2d at 829

(9th Cir. 1988); Petroleum Wholesale 751 S.W.2d at 300; Koch v. Koch Industries, 798 F.Supp. 1525, 1536 (D.Kan. 1992). If they are not substantially related, the analysis ends, and there is no conflict. If the interests are substantially related, then a presumption exists that other members of the firm shared in the confidential information. Atasi, 847 F.2d at 829-830. If in fact this presumption is correct and confidential information was exchanged, then there is a conflict. On the other hand, if the presumption of "shared confidences" applies to a given situation, the Ninth Circuit has allowed the defense of the "Chinese Wall" to be raised. Id. at 831.

In this case effective rebuttal of the presumption would require evidence of an effective screening of both Mr. Grant and Mr. Gallagher form each other as well as the rest of the firm. Id. The Court in Atasi determined that it did not have to decide the availability of the Chinese Wall defense to imputed disqualification since the presumption of shared confidences had not been clearly overcome. Id.

Most of the cases for which the above analysis would apply, including the cases identified by the Administrative Law Judge at the pre-trial conference, involve situations of former clients with adverse interests. Those situations are factually distinguishable from the present situation where there are two current "clients" with potentially adverse interests with one attorney from the same firm representing one client and another attorney who serves in a fiduciary capacity with the other "client" (i.e. a member of its Board of Directors). The relationship between the attorney and the client and the Board member and the Company client is different. Nonetheless, given the nature of the relationships, it would be reasonable to assume that the Board member is held to no less than the same standard, and most likely a

higher standard in dealings with the corporation. The higher standard should likewise require a higher Chinese Wall to overcome the presumption of shared confidences.

Conclusion

The Commission has the authority to disqualify the Gallagher and Kennedy law firm should it conclude that there is a conflict and/or it would be in the public interest. The Commission can disqualify the law firm despite a waiver by the clients of a potential conflict if the Commission determines it would be in the public interest. If the Commission determines that the interests in question are substantially related, it can consider a defense of the "Chinese Wall". The Chinese Wall should be higher than in the normal situation given the higher standards resulting from Mr. Gallagher's relationship to APS as a member of the Board of Directors.

RESPECTFULLY SUBMITTED this 28th day of March, 2002.

Daniel W. Pozefsky
Staff Attorney

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Exhibit A

ADMINISTRATIVE LAW

Volume 5

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CHAPTER 42

Attorney Admission and Discipline in Administrative Practice

Agencies have the authority to discipline attorneys who practice before them.

As set forth in Section 42.01, this authority is derived from rules or regulations promulgated pursuant to general rule-making powers. The United States Code establishes the basic standard for admission to practice before an agency, and agencies have adopted their own regulations supplementing the Code.

Section 42.02 discusses the types of sanctions available, noting that agencies may prevent an attorney from practicing before them on a temporary, short-term or permanent basis.

Grounds for the discipline of attorneys vary from agency to agency, as discussed in Section 42.03. Generally, however, an agency will sanction attorneys for incompetence or unethical behavior. In addition, agency regulations may provide for sanctions based on sanctions imposed by other disciplinary bodies or other agencies.

Section 42.04 notes that disciplinary proceedings affect fundamental rights and reviews the required elements of due process.

Section 42.05 sets forth the standard of review, explaining that disciplinary orders will be upheld if supported by substantial evidence.

SYNOPSIS

§ 42.01 Attorney Practice and Conduct

Agency authority to discipline attorneys is derived from rules or regulations promulgated pursuant to general rulemaking powers. The United States Code establishes the basic standard for admission to practice before an agency and agencies have adopted their own regulations supplementing the Code.

[1]—Basis of Agency Power to Control Attorney Practice and Conduct

Many federal administrative agencies have set the standards for admission to practice before their tribunals as well as the criteria governing suspension, disbarment or other forms of censure for attorney misconduct.[1] The courts, beginning with the Supreme Court decision in *Goldsmith v. United States Board of Tax Appeals,*[2] have consistently upheld agency power to adopt rules of practice and have construed this power as a derivative of the agency's grant of authority

[1] The following list cites nine of the agencies that have promulgated rules of practice and discipline for attorney's appearing before them:

- *CFTC:* Commodity Futures Trading Commission, 17 C.F.R. § 10.11(a)(2) (appearance by attorneys); 17 C.F.R. §§ 14.1–14.10 (rules relating to suspension or disbarment from appearance and practice).
- *FCC:* Federal Communications Commission, 47 C.F.R. § 1.23 (persons who may be admitted to practice); 47 C.F.R. § 1.24 (censure, suspension or disbarment of attorneys).
- *FTC:* Federal Trade Commission, 16 C.F.R. § 4.1(a) (qualifications for practice before the Commission); 16 C.F.R. § 4.1(e) (standards of conduct; disbarment).
- *INS:* Immigration and Naturalization Service, 8 C.F.R. § 292.1(a)(1) (representation by attorneys as defined in § 1.1(f) of title 8); 8 C.F.R. § 292.3 (suspension and disbarment).
- *IRS:* Internal Revenue Service, 31 C.F.R. § 10.3 (attorneys qualified to practice before the Service); 31 C.F.R. §§ 10.50–10.75 (rules applicable to disciplinary proceedings).
- *STB:* Surface Transportation Board, 49 C.F.R. § 1103.2 (qualifications); 49 C.F.R. § 1103.5 (discipline).
- Patent and Trademark Office, 37 C.F.R. § 10.7(a) (rule governing admission to practice for attorneys); 37 C.F.R. § 10.123 (suspension and disbarment proceedings).
- *SEC:* Securities Exchange Commission 17 C.F.R. § 201.102 (appearance and practice by lawyers before the Commission); 17 C.F.R. § 201.102(e) (suspension and disbarment).
- *FERC:* Federal Energy Regulatory Commission, 18 C.F.R. § 385.2101(a) (appearances and practice before the Commission); 18 C.F.R. § 385.2102(b) (suspension).

[2] *Supreme Court:* 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926).

to make rules and regulations necessary and appropriate to implement the provisions of their enabling statute.[3]

Generally, express statutory authority to establish qualifications for admission to practice before a particular agency is not a prerequisite since that power may be implied from the agency's rulemaking authority.[4]

Similarly, the courts have discredited the theory that Congress by express language must vest an agency with disciplinary power.[5] However, before an agency institutes a proceeding barring an attorney from practice before it, the

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[3] *Supreme Court: Id.* In *Goldsmith,* the petitioner, a certified public accountant, sought to compel the Board of Tax Appeals to enroll him as an attorney authorized to practice before the Board. Upon denial by the Board, the petitioner challenged, on appeal, the basis of the Board's power to adopt rules of practice which allowed selective limitation of persons who might appear as taxpayer representatives. It was further submitted that the absence of express statutory authority requiring "a list of enrolled attorneys to which practitioner must be admitted" reflected Congress' intent that such power not be vested in the Board. This argument was invalidated by the Court's holding that an administrative agency authorized to prescribe rules of procedures to effectuate its statutory mandate may therefore set standards for determining eligibility to practice.

See also:

Second Circuit: Touche Ross & Co. v. SEC, 609 F.2d 570 (2d. Cir. 1979).

Seventh Circuit: Koden v. Department of Justice, 564 F.2d 228 (7th Cir. 1977).

District of Columbia Circuit: SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). Fields v. SEC, 495 F.2d 1075 (D.C. Cir. 1974). Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973). Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953).

District Court: District of Columbia: Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957), *aff'd on other grounds* 251 F.2d 919 (D.C. Cir. 1958), *cert. denied,* 356 U.S. 927, (1958). Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[4] *Seventh Circuit:* Koden v. Department of Justice, 564 F.2d 228, 233 (7th Cir. 1977) cited *Supreme Court: Goldsmith, supra* note 2, as controlling on this point and followed this interpretation:

> The Court [in Goldsmith v. United States Board of Tax Appeals] recognized that many statutes creating executive or administrative agencies expressly empower the agency to prescribe qualifications of those who practice before the agency or require a list of enrolled attorneys to which a practitioner must be admitted by the agency. The Court nevertheless held that even in the absence of such express provisions, an agency empowered to prescribe its own rules has the implied power to determine who can practice before it.

See also: cases cited in note 3 *supra.*

[5] *See:* note 4 *supra,* especially *Seventh Circuit: Koden.* The primary issue in *Koden, supra* note 4, involved the authority of the Board of Immigration Appeal and the Immigration and Naturalization Service to suspend or disbar attorney from practice for violation of 8 C.F.R. § 292.3(a)(4), i.e. "willfully misled and deceived an alien by purporting to represent her for a fee whereas he did not in fact do so" and a violation of 8 C.F.R. § 292.3(a)(5), i.e. "plaintiff employed a 'runner' to solicit clients." 564 F.2d at 230.

agency must have acted pursuant to the legislative power to prescribe rules and must, in fact, have promulated rules of admission, practice, *and* discipline.[6]

[a]—Effect of ADMINISTRATIVE PROCEDURE ACT on Agency Disciplinary Power. The ADMINISTRATIVE PROCEDURE ACT recognizes that an agency may impose numerous sanctions in the exercise of its legitimate administrative power.[7] Thus, although the Act does not provide a specific grant of authority

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[6] *District Court: District of Columbia:* Camp v. Herzog, 104 F. Supp. 134 at 137–38 (D.D.C. 1952). The Board had "barred" the plaintiff from practicing before the National Labor Relations Board in the capacity of counsel, attorney, representative or agent, for two years. The Board's order was vacated on grounds that the Board lacked such authority, having failed to promulgate rules of admission:

> The Act creating the National Labor Relations Board provides that the Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of the Act, such rules and regulations to be effective upon the publication in the manner which the Board shall prescribe. 29 U.S.C.A. § 156. It would, therefore, seem quite clear that, giving this language the construction approved in the Goldsmith case, the Board had the power to prescribe rules for the admission of persons to practice before it. The Board has prescribed many rules and regulations, among them the one referred to respecting the exclusion of any person from a hearing for contemptuous conduct, but nowhere has the Board prescribed any rule regulating the admission or enrollment of persons authorized to practice before it, except with respect to certain former employees of the Board. Had the Board done so, there would be no question as to its power to discipline any one so admitted for conduct not in keeping with the requirements for admission or enrollment. Failing to do so, however, the Board has failed to exercise its delegated legislative function to provide the legislative sanction upon which the challenged order must rest.

(Footnotes omitted.)

See also:

District of Columbia Circuit: Herman v. Dules, 205 F.2d 715 at 715–16 (D.C. Cir. 1953). The appellant's right to appear before International Claims Commission was revoked for violations of the canons of ethics. The appellate court affirmed the revocation stating:

> An administrative agency that has general authority to prescribe its rules of procedure may set standards for determining who may practice before it. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 122, 46 S.Ct. 215, 70 L.Ed. 494. The International Claims Commission has express authority to 'prescribe such rules and regulations as may be necessary to enable it to carry out its functions'. 64 Stat. 13, 22 U.S.C.A. § 1622(c). Before this controversy arose the Commission adopted and published certain Rules of Practice and Procedure. 15 F.R. 8675–8678. Section 300.4(b) of these Rules tells how attorneys may qualify to appear before the Commission. Section 300.6 prescribes grounds on which their right to appear may be revoked. One such ground is a finding by the Commission that an attorney has failed to conform to recognized standards of professional conduct. 15 F.R. 8676. This rule supports the Commission's action against the appellant. Camp v. Herzog, 104 F. Supp. 134, decided by the United States District Court for the District of Columbia in 1952, is not to the contrary. If the Board there involved had issued rules, there would have been 'no question as to its power to discipline.' 104 F. Supp. at page 138.

[7] *See:* chapter 41A *supra,* which discusses an agency's authority to impose sanctions.

to discipline attorneys, neither does it contain language that contravenes the right of an agency to censure misconduct.[8] The right to impose various forms of punishment generally accrues from the agency's enabling legislation that provides for rulemaking authority.[9]

A case decided by the Securities Exchange Commission, *In the Matter of William R. Carter and Charles J. Johnson, Jr.,* [10] certifies the APA's position of neutrality on disciplinary proceedings. The Commission, in that proceeding, determined that 5 U.S.C. § 500,[11] which in part establishes a uniform standard

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5 U.S.C. § 551(10) defines a "sanction" as follows:

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action; . . . .

[8] *Id.*

[9] *See:*

Supreme Court: Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926). An administrative agency with authority to set up its procedural rules may adopt standards to govern who may practice before it.

Seventh Circuit: Koden v. Department of Justice, 564 F.2d 228 (7th Cir. 1977). 8 U.S.C. §§ 1103 and 1362 gave the Immigration and Naturalization Service the authority to promulgate a rule disbarring or disciplining attorneys for unprofessional conduct.

District of Columbia Circuit: Schwebel v. Orrick, 153 F. Supp. 701 at 704 (D.D.C. 1957), *aff'd on other grounds* 251 F.2d 919, *cert. denied,* 356 U.S. 927 (1958). The SEC had "implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions: (1) to establish qualifications for attorneys practicing before it, and (2) to take disciplinary action against attorneys found guilty of unethical or improper professional conduct."

See also:

Supreme Court: Mourning v. Family Publications Servs., Inc., 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973). The validity of a regulation will be upheld if it is in furtherance of a legitimate statutory purpose. Further, an express grant of authority is not necessary for a court to sustain the validity of an agency rule so long as the power exercised by the agency bears a reasonable relationship to the agency's explicit statutory power.

[10] Sec. Exch. Act Rel. No. 17597 (1981) (Admin. Proc. File No. 3-5464), C.C.H. Fed. Sec. L. Rep. ¶ 82,847, *rev'g decision of ALJ,* C.C.H. Fed. Sec. L. Rep. ¶ 82,175 (Mar. 7, 1979). This case is hereinafter cited as Sec. Exch. Act. Rel. No. 17597.

[11] 5 U.S.C. § 500 provides in part:

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written

for the admission of attorneys to practice before federal agencies,[12] does not specifically preclude an agency's exercise of authority to discipline persons acting in a representative capacity.[13] Focusing on the language of 5 U.S.C. § 500(d)(2), the Commission noted that the Act neither "authorizes" nor "limits" disciplinary measures, including the disbarment of individuals who appear before agency tribunals.[14] Consequently, in conjunction with a review of the legislative history,[15] the Commission termed the language of Section 500(d)(2) neutral in its effect on an agency's capacity to sanction counsel appearing before it.[16]

[b]—Usurpation of Inherent Judicial Function. Since Article III of the Constitution vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

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declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(d) This section does not—

(1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

(2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency;

(3) authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; or

(4) prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money.

[12] *See:* note 11 *supra.*

[13] *See:* Sec. Exch. Act Rel. No. 17597, note 10 *supra.*

[14] Sec. Exch. Act Rel. No. 17597:

For purposes of this issue, the relevant provision of this section of the Administrative Practice Act is paragraph (d)(2) which provides that the Act '*does not* . . . authorize or *limit the discipline,* including disbarment, of individuals who appear in a representative capacity before an agency . . .' (emphasis added). Although this language is neutral with respect to the disciplinary authority of federal agencies over professionals appearing before them in a representative capacity, the supporting legislative history makes clear that Congress, by eliminating agency-established admission requirements, did not intend, as a secondary or collateral purpose, to affect or delimit the existing disciplinary authority of federal agencies which, by that time, was well recognized and accepted.

(Footnote omitted.)

[15] 1965 U.S. Code Cong. & Adm. News 4170, 4178.

[16] *See:* note 14 *supra.*

Commission's Secretary, in VHS format with voice-over or pictorial inclusion of the data contained in the accompanying written statement, serve copies of the videotape on all of the other parties to the proceeding, and include a certificate of service with the filing.

[Order 573, 59 FR 63247, Dec. 8, 1994]

Subpart U—Appearance and Practice Before the Commission

§ 385.2101 Appearances (Rule 2101).

(a) A participant may appear in a proceeding in person or by an attorney or other qualified representative. An individual may appear in his or her own behalf, a member of a partnership may represent the partnership, a bona-fide officer of a corporation, trust, association or organized group may represent the corporation, trust, association or group, and an officer or employee of a State commisssion, of a department or political subdivision of a State or other governmental authority, may represent the State commission or the department or political subdivision of the State or other governmental authority, in any proceeding.

(b) A person compelled to appear or voluntarily testifying or making a statement before the Commission or the presiding officer, may be accompanied, represented, and advised by an attorney or other qualified representative.

(c) A person appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States, and where applicable, to the requirements of Section 12(i) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 791(i)).

§ 385.2102 Suspension (Rule 2102).

(a) After a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found:

(1) Not to possess the requisite qualifications to represent others, or

(2) To have engaged in unethical or improper professional conduct, or

(3) Otherwise to be not qualified.

(b) Contumacious conduct in a hearing before the Commission or a presiding officer will be grounds for exclusion of any person from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.

§ 385.2103 Appearance of former employees (Rule 2103).

(a) No person having served as a member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission may practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which such person has handled, investigated, advised, or participated in the consideration of while in the service of the Commission.

(b) No person having been so employed may within 1 year after his or her employment has ceased, practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which was under the official responsibility of such person, as defined in 18 U.S.C. 202, while in the service of the Commission.

(c) Nothing in paragraphs (a) and (b) of this section prevents a former member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission with outstanding scientific or technological qualifications from practicing before or acting as an attorney or representative in connection with a particular matter in a scientific or technological field if the Chairman of the Commission makes a certification in writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or representation.

Subpart V—Off-the-Record Communications; Separation of Functions

§ 385.2201 Rules governing off-the-record communications (Rule 2201).

(a) *Purpose and scope.* This section governs off-the-record communications with the Commission in a manner that

§ 42.03 Types of Sanctions

Agencies may prevent an attorney from practicing before them on a temporary, short-term or permanent basis. In addition, an attorney may be disqualified from participating in a particular proceeding when there is a conflict of interest or other impropriety.

An agency may institute disciplinary proceedings against attorneys appearing before it when the attorneys violate rules of practice as defined by the particular administrative body.[1] The sanctions resulting from those proceedings may range from disqualification[2] or censure[3] to suspension[4] and ultimately the harshest penalty, disbarment.[5]

[1]—Suspension

Suspension constitutes the act of "temporarily" denying an attorney[6] or other individual, duly authorized by the agency to act in a representative capacity,[7] the right to practice[8] or appear at its hearings. Agencies have disciplined attorneys

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[1] *See:* § 42.02 *supra* for a general discussion of grounds for imposing sanctions.

[2] *See:* § 42.03[4] *infra.*

[3] *See:* § 42.03[3] *infra.*

[4] *See:* § 42.03[1] *infra.*

[5] *See:* § 42.03[2] *infra.*

[6] "Attorney" is generally defined in agency regulations as one who is a member in good standing of a Supreme Court bar or the bar of the highest State court.

See: § 42.01[2] note 39 *supra* for the definition of "attorney".

[7] Certain agencies authorize qualified representatives or lay advocates to appear for individuals in lieu of counsel:

See: Drug Enforcement Administration, Department of Justice, 21 C.F.R. § 1316.50. Federal Energy Regulatory Commission, 18 C.F.R. § 385.2101(a). Social Security Administration, 20 C.F.R. § 416.1450.

See also:

17 C.F.R. § 201.102(b). Appearances by nonlawyers are permitted by the SEC:

> (b) *Representing others.* In any proceeding, . . . ; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association; and an officer or employee of a State commission or of a department or political subdivision of a State may represent the State commission or the department or political subdivision of the State.

37 C.F.R. § 10.6(b), which provides for practice by nonlawyers before Patent and Trademark Office: "(b) *Agents.* Any citizen of the United States not an attorney at law who fulfills the requirements of this part may be admitted to practice before the Office."

[8] *See:* definition of "practice" at 31 C.F.R. § 10.2(a) which states:

> (a) 'Practice before the Internal Revenue Service' comprehends all matters connected with presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered

or representatives who contravene rules of practice of the agencies, e.g., where there:

(1) were charges of alleged unethical and improper professional conduct relating to counsel's representation of a client before the Securities and Exchange Commission;[9]

(2) was an "unprovoked" assault by counsel upon an attorney representing the General Counsel of the National Labor Relations Board;[10]

(3) were charges of alleged unethical and improper conduct unrelated to Commission practice but involving an agreement by counsel to share a fee with a layperson purportedly able to wield influence with the SEC and secure clearance of a regulation statement for the proposed offer of company shares;[11]

(4) were charges of willfully misleading or deceiving an alien by purporting to represent such alien without intent to do so and of employing runners to solicit clients for the attorney to represent before the Immigration and Naturalization Service;[12]

(5) were charges that a former Federal Trade Commission Counsel transmitted confidential Commission documents to a current employer describing an ongoing investigation of breakfast cereal companies.[13]

Although the agency regulations do not set forth mandatory time periods for suspension, cases indicate that the time imposed by the hearing officer often ranges from six months to two years.[14]

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by the Internal Revenue Service. Such presentations include preparing and filing necessary documents, correspondence, and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings.

"Practice" is also defined by 8 C.F.R. § 1.1(i) as follows:

(i) The term 'practice' means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer or the Service, or the Board.

[9] *District Court: District of Columbia:* Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957), *aff'd on other grounds,* 251 F.2d 919 (D.C. Cir.), *cert. denied,* 356 U.S. 927 (1958).

[10] *District Court: District of Columbia:* Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[11] *District of Columbia Circuit:* Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973).

[12] *Seventh Circuit:* Koden v. Department of Justice, 564 F.2d 228 (7th Cir. 1977).

[13] *District of Columbia Circuit:* Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976).

[14] *See, e.g.:*

Seventh Circuit: Koden v. Department of Justice, note 12 *supra.* The Board imposed a six-month suspension for violation of 8 C.F.R. § 292.3(a)(4), "wilfully deceiving or misleading any party to a case concerning any matter related to a case," and a six-month suspension for violation of 8 C.F.R. § 292.3(a)(5), "soliciting practice in an unethical or unprofessional manner."

District of Columbia Circuit: Kivitz v. SEC, note 11 *supra.* The plaintiff was suspended from practice before the Commission for two years.

[2]—Disbarment

Disbarment is the harshest sanction an agency, upon finding evidence of professional misconduct, may impose upon counsel since the effect is to permanently deny the right to practice before an agency.[15]

In *Kingsland v. Dorsey,*[16] the Supreme Court upheld the decision of the Commissioner of Patents barring an attorney from practice before the agency. The appellant had participated in the preparation and presentation of an article to the Patent Office with knowledge that a signature was forged.[17] The court reaffirmed the agency's obligation to regulate the character and conduct of its practitioners.[18] This obligation was particularly critical since the complex nature of the patent application demanded the highest degree of candor and good faith by counsel.[19]

The Supreme Court in *Goldsmith v. United States,*[20] in upholding the agency's right to promulgate rules of discipline to restrain and penalize misconduct, also emphasized that the "magnitude of the interests" affected by agency decisions

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District Court: District of Columbia: Camp v. Herzog, note 10 *supra.* It was requested that the plaintiff be prohibited from practicing before the National Labor Relations Board for a period of two years.

[15] *See:* § 42.04[1] *infra* for a general discussion of disciplinary proceedings.

[16] *Supreme Court:* 338 U.S. 318, 70 S. Ct. 123, 94 L. Ed. 123 (1949), *reh'g denied,* 338 U.S. 939 (1950).

[17] *District of Columbia Circuit: Kingsland,* 69 F. Supp. 788 (D.D.C. 1947), *rev'd,* 173 F.2d 405 (D.C. Cir. 1949).

But see:

Supreme Court: The Supreme Court *Kingsland* decision reversed the judgment of the court of appeals and affirmed the district court's conclusion that the hearings were fairly conducted after proper notice of the charges and that substantial evidence supported the findings. Accordingly, action of the Commission barring counsel from practice before the United States Patent Office was correct.

[18] *Supreme Court:* 338 U.S. at 319–20.

> The statute under which the Commissioner acted represents congressional policy in an important field. It relates to the character and conduct of 'persons, agents, or attorneys' who participate in proceedings to obtain patents. We agree with the following statement made by the Patent Office Committee on Enrollment and Disbarment that considered this case: 'By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office * * * must rely upon their integrity and deal with them in a spirit of trust and confidence * * *.' It was the Commissioner, not the courts, that Congress made primarily responsible for protecting the public from the evil consequences that might result if practitioners should betray their high trust. Having serious doubts as to whether the Court of Appeals acted properly here in nullifying the Commissioner's order, we granted certiorari.

[19] *Supreme Court: Id.*

[20] *Supreme Court:* 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926).

requires qualified representation to secure justice for a party and assist the agency in the "discharge of its . . . duties."[21] Thus the agency is committed to protect the integrity of the hearing process by imposing those sanctions necessary to assure representation by competent counsel.[22]

[3]—Censure

An agency may, for breach of the requisite standards of conduct, bar counsel from a pending or ongoing hearing.[23] The exclusion of counsel may be based upon alleged contemptuous,[24] contumelious[25] or contumacious[26] behavior. For

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[21] *Supreme Court:* 270 U.S. at 121–22.

[22] *See:*

Second Circuit: Touche Ross & Co. v. SEC, 609 F.2d 570, 582 (2d. Cir. 1979). The court noted that Rule 2(e), which provides that the Commission may temporarily or permanently deny the privilege of appearing or practicing before it on three enumerated grounds, was "a necessary adjunct to the Commission's power to protect the integrity of its administrative procedures and the public in general."

[23] *Third Circuit: In re* Weirton Steel Co. and Steel Workers Organizing Comm., 8 N.L.R.B. 581 (1938), *aff'd,* 135 F.2d 494 (3d. Cir. 1943). The court of appeals affirmed the decision of the Board that the trial examiners' exclusion of counsel from the hearing was justified and well within bounds of its discretionary power. Counsel had engaged in contemptuous conduct

Seventh Circuit: Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969). The petitioner contended, on appellate review, that the actions of the trial examiner in excluding counsel on the thirteenth day of the hearings denied the petitioner its constitutional right to counsel and its right to a fair hearing. The Board without granting a hearing denied the appeal of the trial examiner's exclusionary ruling and upheld the ruling on the ground that the trial examiner did not abuse discretion. The Board, however, did not render, until almost two years later, its basis for finding propriety in the trial examiner's expulsion of the counsel. The court held that, although contemptous behavior is an appropriate ground for excluding a person from the hearing, mere conclusions of contempt unsupported by specific facts or supporting citations carry no weight on judicial review. The counsel's expulsion was violative of the petitioner's right to counsel and the petition to review and set aside the order of the Board was granted.

[24] Internal Revenue Service, 31 C.F.R. § 10.51(i).

See also:

Seventh Circuit: Great Lakes Screw Corp. v. NLRB, note 23 *supra,* at 377–78. *Great Lakes* contains excerpts from exchanges that led to the trial examiner's exclusion of counsel from NLRB proceedings:

> The following comments exemplify the hostile and petty flavor which characterized and permeated a significant portion of the proceedings before the trial examiner. Many of these comments, when read in context, appear to have been provoked by unsavory conduct; others seem to be the proximate result of overreaction to various procedural maneuvers and rulings; and others seem to be solely attributable to tasteless gratuity. While such comments emanated from all participants in the hearing, including the trial examiner, little value would be garnered from identifying the author of each of these deplorable and lamentable statements.
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> 'That is nothing more than * * * trivial Board procedures.'
>
> '* * * they are hoping to taint this hearing with prejudice and bias.'

purposes of the discussion of forms of agency sanctions, exclusion has been classified as a form of censure since it is a penalty of relatively short duration and may be equated with a reprimand.[27] It is distinguishable from agency imposed sanctions for misconduct such as suspension or disbarment.[28] The latter disciplinary measures may effectively deprive attorneys of a portion of their livelihood by preventing their practice or appearance for periods up to and exceeding six months or permanently.[29]

[4]—Disqualification

Where an agency perceives that a potential conflict of interest will arise from an attorney's representation of a party, it may seek to rectify this breach of

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'* * * the experiences that we have had in this case * * * is an amass of junk in a procedure that is not called for * * *.'

'* * * it is an attempt to introduce a little bias and to bad mouth * * *.'

'I don't intend to run a night school.'

'* * * in essence they are asking you for the opportunity to come in * * * and bad mouth * * * to incite bias and prejudice * * *

'They have got their pound of flesh and now they want to stink this hearing up with bias and prejudice. * * * I am not running a night school here either.'

'* * * my learned colleague has a great way of asking misleading questions.'

'* * * he is not on the stage. and this is not a vaudeville show. He is not a performer here.'

'* * * I am not going to undertake to teach you at this point [how to conduct a cross-examination].'

'You have no right to recite like a parrot what is going on in this room.'

'I don't like your cavalier attitude.'

'What do you think you are running here? Do you think you are in a circus?'

'Well, * * *, he asked for it [an uncalled for ridicule].'

'* * * it is ungentlemanly, uncalled for, unwarranted. it is a lie.'

See also:

Third Circuit: In re Weirton Steel Co. and Steel Workers Organizing Comm., note 23 *supra.*

[25] Immigration and Naturalization Service, 8 C.F.R. § 292.3(11).

[26] Federal Energy Regulatory Commission, 18 C.F.R. § 385.2102(b).

[27] It should be noted that the severity and opprobrious nature of the conduct may warrant a more severe penalty than contempt.

See:

District Court: District of Columbia: Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952). Assault on opposing counsel resulted in suspension from practice before the National Labor Relations Board for two years.

INS: The Immigration and Naturalization Service regulation, 8 C.F.R. § 292.3(11), also provides that "contumelious" conduct may be punished by disbarment, suspension or contempt.

[28] *See:* § 42.03[1] and [2].

[29] *Id.*

accepted standards of professional ethics[30] and agency regulation[31] by disqualifying counsel. Questions of attorney impropriety have arisen in the administrative context where (1) counsel representing a party to a proceeding before an agency formerly represented another party to that proceeding on a related matter,[32] and

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[30] *See:* ABA Code of Professional Responsibility, Disciplinary Rule 5-105(c):

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Ninth Circuit:

Smiley v. Director, OWCP, 984 F.2d 278 (9th Cir. 1993). The plaintiff was denied her compensation claim under the LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT and sought review of the decision of the Benefits Review Board affirming the ALJ's decision. The plaintiff claimed that, because of a conflict in interest, her deceased attorney had been ineffective. The court noted that the rule against concurrent representation is based on the duty of undivided loyalty owed by an attorney to his client. One of her deceased attorney's clients was the insurance plan administrator that had been actively involved in managing the plaintiff's medical treatment, and that had chosen the physician who gave the plaintiff an unfavorable medical opinion. The plaintiff alleged that favorable medical evidence was in a file belonging to a claims examiner of this insurance plan administrator. The deceased attorney's dual representation presented grounds for disqualification if consent was lacking.

Smiley v. Director, OWCP, 973 F.2d 1463 (9th Cir. 1992), *withdrawn*, 93 Cal. Daily Op. Service 424 (9th Cir. Jan. 21, 1993), *substituted opinion reported at* 984 F.2d 278 (*supra* this note). The plaintiff, an injured worker and compensation claimant, challenged the decision of the Benefits Review Board affirming the administrative law judge's decision denying her benefits under the LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT. The plaintiff argued that there was a conflict of interest on the part of her deceased attorney. The Navy argued there was no conflict because the attorney's representation of her was unrelated to the matters in which he represented the insurance carrier. The court of appeals found that there was a serious and direct financial conflict between the attorney's two clients: the claimant and the insurance carrier. The ALJ's failure to determine whether Killip should be disqualified required reversal.

[31] *FCC:* The Federal Communications Commission will discipline attorneys for failure to conform to standards of ethical conduct required by practitioners before the bar of any court. 47 C.F.R. § 1.24(2).

FTC: The Federal Trade Commission requires "all attorneys practicing before the Commission" to "conform to the standards of ethical conduct required by the bars of which the attorneys are members." 16 C.F.R. § 4.1(e)(1).

[32] *Ninth Circuit:* Smiley v. Director, Office of Workers Compensation Programs, 973 F.2d 1463 (9th Cir. 1992). A claimant sought judicial review of a decision denying her benefits under the

(2) counsels represented multiple witnesses in a single proceedings.[33] However, an agency's right to exclude an attorney from a hearing, pursuant to its rules and regulations, must be construed in relation to the imperative language of 5 U.S.C. § 555(b) of the ADMINISTRATIVE PROCEDURE ACT.[34] This section provides that a party summoned to appear before a federal agency has a right to be assisted by counsel.[35] Moreover, Section 555(b) has not only been

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LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT. The claimant argued that there was a conflict of interest on the part of her deceased attorney. The court of appeals held that the ALJ had the authority to make complete inquiries and, if necessary, to disqualify counsel. There was no indication that the ALJ inquired into (1) the ethical conflict posed by the dual representation or (1) whether the attorney's clients had consented to it. Lacking informed consent, the ALJ's ruling violated long standing principles against concurrent representation of adverse interests.

NRC: Toledo Edison Co. 39 Ad. L. 2d 769 (1976). In a proceeding before the NRC involving antitrust issues, the City of Cleveland, a party adverse to the utility company, sought to disqualify a law firm representing the utility. The law firm had represented the city in matters related to its municipal light plant in the past and also represented the utility without ever disclosing to the city the conflict of interest inherent in such representation. It was alleged further that a partner in the law firm formerly worked for the city's law department and may have had access to information adverse to the city's position. The court held that the Commission had the authority to disqualify the firm.

[33] *District of Columbia Circuit:* SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). In an appeal from a district court order conditioning enforcement of an SEC subpoena of respondent to appear at hearing on his right to be accompanied by an attorney, the SEC presented evidence that respondents' attorneys represented three other parties who were principal targets of agency investigation and that the parties may have been coerced to accept attorneys services "to maintain a common front." The court held that the facts did not constitute evidence of misconduct so as to supersede the right guaranteed by 5 U.S.C. § 555 of the ADMINISTRATIVE PROCEDURE ACT to be represented by counsel.

[34] *District of Columbia Circuit:* SEC v. Csapo, note 33 *supra.*

[35] 5 U.S.C. § 555(b) provides that:

> (b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

See also:

District of Columbia Circuit: Law Offices of Seymour M. Chase, P.C. v. FCC, 843 F.2d 517 (D.C. Cir. 1988). An agency order disqualifying an attorney is not reviewable when the petition for judicial review is filed by the attorney; the order is reviewable only when the petition for judicial review is filed by the client.

interpreted as a guarantee of the "right to counsel"[36] but also the "right to counsel" of one's choice.[37] Thus, although the agency may deem exclusion of counsel important in preserving the integrity of the agency's investigative process, the agency is bound to present "concrete evidence" that counsel's presence would obstruct or subvert the agency process.[38]

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[36] *See:*

District of Columbia Circuit: SEC v. Csapo at note 33 *supra.*

But see:

Sixth Circuit: Father & Sons Lumber and Bldg Supplies, Inc., 931 F. 2d 1093, 1097 (6th Cir. 1991). The Sixth Amendment right to effective assistance of counsel does not apply to civil cases such as one involving labor relations. The APA did not confer a statutory right to effective assistance of counsel in this case.

[37] *Fifth Circuit:* Backer v. Commissioner, 275 F.2d 141 at 144 (5th Cir. 1960).

> We recognize that what is in issue here is not the constitutional right to counsel. It is, however, a statutory right. The term "right to counsel" has always been construed to mean counsel of one's choice. . . . We think this is the plain and necessary meaning of this provision of the law. When Congress used the terms 'right to be accompanied, represented, and advised by counsel,' it must have used the language in the regularly accepted connotation, even though the language of the courts in using it was in connection with the right to counsel guaranteed by the Sixth Amendment to the constitution.

[38] *Seventh Circuit:* Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 380–81 (7th Cir. 1969).

> By excluding counsel without setting forth with sufficient particularity the basis for such action, the Board has substantially and prejudicially violated the Administrative Procedure Act. By denying petitioner his statutorily afforded right, administrative due process has been violated. This cause is therefore properly subject to a reversal and remandment for a new hearing.
>
> Even assuming that the Board's explanation adequately disclosed its basis for upholding the exclusion of counsel, we still hold that the cause should be reversed and remanded for a new hearing.
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> Upon consideration of the proceedings prior to counsel's exclusion, we are of the opinion that while counsel's conduct during the hearing was far from being the paragon of comportment, it did fall short of constituting contemptuous behavior. Consequently, we find counsel's expulsion to be unwarranted and therefore violative of petitioner's right to counsel as provided for by the Administrative Procedure Act.

See also:

District of Columbia Circuit: Law Offices of Seymour M. Chase, P.C. v. FCC, 843 F.2d 517 (D.C. Cir. 1988). An agency order disqualifying an attorney is not reviewable when the petition for judicial review is filed by the attorney; the order is reviewable only when the petition for judicial review is filed by the client.